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No. 90-375

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JAMES LESLIE BROWN,

Petitioner,

v.

CURTIS D. EARP, JR., COMMISSIONER, GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Whether a state statute imposing procedural limitations on the power of state trial courts to entertain petitions for the writ of habeas corpus by limiting the time within which such petitions may be filed is a suspension of the writ prohibited by Art. I, Sec. IX, Cl. II of the United States Constitution?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED 1

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE WRIT 3

A. THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS 3

B. A TIME LIMITATION ON FILING A PETITION FOR WRIT OF HABEAS CORPUS TO REVIEW MISDEMEANOR TRAFFIC CONVICTIONS IS NOT AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT 4

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Earp v. Angel, 257 Ga. 333 (1987)..... 12

Earp v. Boylan, 260 Ga. 112 (1990).....5, 6

Earp v. Fletcher, 183 Ga. App. 593 (1987) 12

Earp v. Lynch, 257 Ga. 633 (1987)..... 12

Ginsberg v. Abrams, 702 F.2d 48 (2nd Cir. 1983)..... 6

Grego v. Sheriff, 574 P.2d 275 (Nev. 1978)..... 9

Griffin v. Illinois, 351 U.S. 12 (1956) 4

Hardison v. Martin, 254 Ga. 719 (1985)..... 12

Harts v. State of Indiana, 732 F.2d 95 (7th Cir. 1984)..... 6

Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976) 6

Heflin v. United States, 358 U.S. 415 (1959)..... 8

Hensley v. Municipal Court, 411 U.S. 345 (1973) 6

Jones v. Cunningham, 371 U.S. 236 (1963) 6, 7

Jordan v. Housewright, 696 P.2d 998 (Nev. 1985)..... 10

Lawrence v. Jones, 837 F.2d 1572 (11th Cir. 1988)..... 10

Lefkowitz v. Fair, 816 F.2d 17 (1st Cir. 1987)..... 6

Lillios v. New Hampshire, 788 F.2d 60 (1st Cir. 1986)..... 6

Maleng v. Cook, 490 U.S. ___, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989).....7, 8

McKane v. Durston, 153 U.S. 684 (1894)..... 4

TABLE OF AUTHORITIES – Continued

Page

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 11

Patterson v. Earp, 257 Ga. 729 (1988) 10

Ross v. Moffitt, 417 U.S. 600 (1974) 4

Tinder v. Paula, 725 F.2d 801 (1st Cir. 1984) 6

Vasquez v. Hillery, 474 U.S. 254 (1986) 8

Westberry v. Keith, 434 F.2d 623 (5th Cir. 1971) 6

Whorley v. Brilhart, 359 F. Supp. 539 (E.D. Va. 1973) 6

Williams v. Lockhart, 873 F.2d 1129 (8th Cir. 1989) 9

Zant v. Cook, 259 Ga. 299 (1989) 8

STATUTES

O.C.G.A. § 40-5-58 2

O.C.G.A. § 40-6-391 2

O.C.G.A. § 40-13-33 ..... 3, 4, 10, 13

Ark. R. Crim. P. 37.1 9

Ark. R. Crim. P. 37.2 9

OPINIONS BELOW

The only opinions issued in this case were issued by the Superior Court of Fulton County, Georgia, and by the Supreme Court of Georgia. The opinion of the Supreme Court of Georgia is reported at 260 Ga. 215 (1990). The Order of the Superior Court of Fulton County is unreported. Both opinions are attached to Petitioner's Petition for Writ of Certiorari as appendices.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition for a Writ of Certiorari, Respondent submits that the following provision is relevant to this case.

United States Constitution, Amendment Ten:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Petitioner was charged, by accusation, with committing the traffic offense of driving under the influence in

violation of O.C.G.A. § 40-6-391 on three separate occasions. Convictions were entered on these charges on October 28, 1983, in the State Court of Spalding County; on November 1, 1983, in the Recorder's Court of the City of Woodbury; and on February 23, 1987, in the Recorder's Court of the City of Hampton. Petitioner was declared to be a habitual violator by the Georgia Department of Public Safety pursuant to the provisions of Georgia's Habitual Violator Act, O.C.G.A. § 40-5-58, which provides for the mandatory revocation for a five-year period of the driver's license of a person arrested and convicted three or more times within a five-year period of certain designated offenses, including driving under the influence.

Petitioner requested and received an administrative review of the revocation of his driver's license, and subsequently appealed the hearing officer's decision upholding the revocation to the Superior Court of Spalding County, which denied his appeal and entered judgment against him. The Georgia Court of Appeals denied an application for discretionary appeal on July 7, 1988. Some seven months later, on January 20, 1989, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Fulton County, challenging each of the three convictions for driving under the influence which led to his classification as a habitual violator and to the revocation of his driver's license. Petitioner contends that he entered guilty pleas to these charges which were not entered knowingly and voluntarily.

After a hearing, the Superior Court of Fulton County entered an Order on June 29, 1989, granting the relief sought by Petitioner. Respondent filed a Notice of Appeal with the Clerk of the Superior Court of Fulton County on

July 19, 1989. The reporter filed the transcript of proceedings with the Clerk on August 7, 1989, and the case was docketed in the Georgia Supreme Court on January 9, 1990. The Supreme Court received briefs from both parties and heard oral argument on March 13, 1990.

On May 17, 1990, the Supreme Court of Georgia issued a unanimous opinion reversing the judgment of the Superior Court of Fulton County. Petitioner's Motion for Reconsideration was denied May 31, 1990, and the court, on June 1, 1990, granted Petitioner's Motion for Stay of Remittitur for a 90-day period in order for Petitioner to file the instant Petition.

REASONS FOR DENIAL OF THE WRIT

A. THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

Petitioner seeks to appeal from the judgment of the Supreme Court of Georgia that O.C.G.A. § 40-13-33, a state statute of limitation on the filing of habeas corpus petitions challenging misdemeanor traffic convictions, is not an unconstitutional suspension of the writ. As is set forth in greater detail *infra*, Respondent submits that the determination as to whether habeas corpus proceedings or other post-conviction relief will be afforded is a matter left for the states to decide which does not implicate the United States Constitution. Even if the Constitution is implicated, Respondent submits that the Georgia Supreme Court correctly analyzed this issue and correctly concluded that the statute in question is not an unconstitutional suspension of the writ. Respondent contends

that there are no substantial federal questions presented for review, as the State is simply not required to provide avenues for post-conviction relief in the State's own courts. *Cf. Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (*citing McKane v. Durston*, 153 U.S. 684, 687 (1894)). *See also Griffin v. Illinois*, 351 U.S. 12 (1956).

B. A TIME LIMITATION ON FILING A PETITION FOR WRIT OF HABEAS CORPUS TO REVIEW MISDEMEANOR TRAFFIC CONVICTIONS IS NOT AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT.

It is undisputed by the parties to this action that Petitioner did not file his Petition for Writ of Habeas Corpus within the time prescribed in O.C.G.A. § 40-13-33. As relevant to the case at bar, that Code section provides that:

> (a) Any challenge to a misdemeanor conviction of any of the traffic laws of this State, or the traffic laws of any county or municipal government which may be brought [by petition for writ of habeas corpus] must be filed within 180 days of the date the conviction becomes final.
>
> (b) Any challenge to a conviction specified in subsection (a) of this Code section which became final before March 28, 1986, must be filed within 180 days following March 28, 1986.
>
> • • •
>
> (d) Failure to file a challenge within the time prescribed in this Code section shall divest the court of jurisdiction.

O.C.G.A. § 40-13-33. Petitioner failed to file his Petition for Writ of Habeas Corpus in a timely manner as required

by Georgia law. Accordingly, the Supreme Court of Georgia found that the trial court erred in failing to dismiss the petition. Petitioner contends that this statute violates the provisions of Art. I, Sec. IX, Cl. II of the United States Constitution, as the time restriction on the filing of habeas corpus petitions is a prohibited suspension of the writ of habeas corpus. The Georgia Supreme Court rejected that contention in the case at bar, following its previous ruling in *Earp v. Boylan*, 260 Ga. 112 (1990).

Respondent contends that Petitioner's claim is without merit. Although the United States Constitution prohibits the federal government from suspending the writ of habeas corpus, except in cases of rebellion or invasion, it has no application to the question of whether the State of Georgia must provide for habeas corpus as a part of its own post-conviction remedies. A person deprived of his liberty by the state is in no way harmed by the state's decision not to provide post-conviction remedies under state law; if he has a meritorious claim, he may simply bring the claim to the federal courts for review. It is therefore clear that Petitioner's arguments are without merit.

Nevertheless, the Georgia Supreme Court proceeded to analyze Petitioner's claims under the assumption that this provision of the Constitution might in some manner proscribe limitations upon habeas corpus relief afforded in the courts of the State of Georgia (Petitioner also contended that the challenged statute violated the similar provision of the Georgia Constitution, an issue of state law not raised here). The court noted that the federal courts presented with the question have held that federal

law does not give the federal courts jurisdiction to entertain a petition for writ of habeas corpus when the only basis alleged to satisfy the statutory requirement that the petitioner be "in custody" is the suspension of a driver's license. *Boylan*, at 113, *citing Harts v. State of Indiana*, 732 F.2d 95 (7th Cir. 1984); *Westberry v. Keith*, 434 F.2d 623 (5th Cir. 1971); *Whorley v. Brilhart*, 359 F. Supp. 539 (E.D. Va. 1973). Other courts which have considered the issue have reached the same conclusion. *Lefkowitz v. Fair*, 816 F.2d 17 (1st Cir. 1987); *Lillios v. New Hampshire*, 788 F.2d 60 (1st Cir. 1986); *Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984); *Ginsberg v. Abrams*, 702 F.2d 48 (2nd Cir. 1983); *Harvey v. South Dakota*, 526 F.2d 840 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). Habeas corpus "has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Petitioner simply was not "in custody" within the meaning of the federal statute at any time during the pendency of this petition. As such, he could not have maintained a petition for writ of habeas corpus in the federal courts, and it is therefore absurd to contend that the Constitution mandates that the State provide for habeas corpus review of his convictions where federal law does not.

The cases cited by Petitioner are not inconsistent with this conclusion. Petitioner relies heavily upon the restrictions upon the use of a motor vehicle present in *Jones v. Cunningham*, 371 U.S. 236 (1963), a case in which this Court found that the petitioner was in custody even though not incarcerated. However, careful review of that case discloses that the restrictions upon the petitioner's

use of a motor vehicle were not imposed as independent, administrative consequences of a traffic violation; the petitioner was serving the remainder of an *unexpired* sentence on parole and the restrictions on his use of a motor vehicle were some of the numerous conditions of that parole. The Court found that the sum of these conditions, rather than merely the restrictions upon the use of a motor vehicle, sufficiently restrained the petitioner's liberty to lead to the conclusion that an individual serving an unexpired sentence on parole remained "in custody" for the purpose of habeas corpus review. *Jones* does not stand for the proposition that the mere suspension or revocation of a driver's license, standing alone, renders the individual "in custody" for the purposes of habeas corpus review.

Similarly, *Maleng v. Cook*, 490 U.S. ___, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989) also supports Respondent's position. There, the prisoner had completed service of a state sentence, was serving a federal sentence, and would embark upon the service of another state sentence after the completion of the federal sentence. He alleged that the initial state sentence would increase the required term of service of the second state sentence, and therefore sought review by writ of habeas corpus. The Court held that, once a sentence has fully expired, a petitioner is no longer "in custody" because of the possibility that the prior conviction may enhance subsequent sentences. *Id.*, at 545-46. The Court noted that the petitioner could challenge the initial conviction in his challenge to incarceration on the subsequent sentence, allowing him to proceed at that time because he was subject to a detainer to ensure his return for service of the state sentence. *Id.*, at 546. A

driver's license revocation is not a detainer, nor in any way comparable, and *Maleng* does not so hold.

Finally, Petitioner makes the argument that "mere delay" in bringing a habeas corpus petition is not a basis for its dismissal. There is no basis in law for this argument. Initially, Petitioner relies upon a Georgia case addressing solely issues of state law in which there was no applicable statutory provision regulating the time of filing of the petition. *Zant v. Cook*, 259 Ga. 299 (1989). Thus, the analysis in *Cook* was based upon the common law doctrine of laches, not upon a statutory period of limitation, and presented no constitutional issues for decision by the court. Similarly, in *Heflin v. United States*, 358 U.S. 415 (1959), Petitioner notes this Court's statement that "there is no statute of limitations, no res judicata, and . . . the doctrine of laches is inapplicable." *Id.*, at 420. This statement is contained in a concurring opinion written by Justice Stewart. Moreover, the statement, taken in context, addresses questions of statutory interpretation, not constitutional mandates. Nothing in *Heflin* stands for the proposition that Congress, in establishing a system of post-conviction review under federal law, or the states, in establishing their own such procedures, could not establish a statute of limitations, the doctrine of res judicata, or the doctrine of laches as applicable to habeas corpus proceedings. Indeed, Petitioner fails to note this Court's statement in *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986), in which the Court noted that:

> Despite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. . . . We should not lightly create a new judicial rule, in the guise of

> constitutional interpretation, to achieve the same end.

Respondent asserts that the converse is also true; the Court should not create a new judicial rule, in the guise of constitutional interpretation, forbidding that end.

Clearly, there is no constitutional prohibition against the enactment and enforcement of a period of limitation for the filing of petitions seeking post-conviction review, including petitions for a writ of habeas corpus. The statute in question is limited in its application to individuals convicted of misdemeanor traffic violations. The statute imposes absolutely no time limitation upon the filing of a petition for writ of habeas corpus by convicted felons. The State of Arkansas has, however, imposed just such a limitation. As construed by the Supreme Court of Arkansas, the Arkansas Rules of Criminal Procedure provide for post-conviction review, but limit such review to petitions brought within three years of the date of commitment. Ark. R. Crim. P. 37.1, 37.2. The Eighth Circuit Court of Appeals has held that the failure to bring a timely petition under Arkansas law operates to bar subsequent consideration of a prisoner's claims in federal habeas proceedings, based upon the procedural default in failing to timely file the state petition. *Williams v. Lockhart*, 873 F.2d 1129, 1132 (8th Cir. 1989). Other states have imposed statutes of limitation, to varying degrees. Nevada limits the filing of pretrial habeas corpus petitions by prohibiting consideration of petitions filed later than 21 days after the first appearance of the accused before the trial court. *Grego v. Sheriff*, 574 P.2d 275 (Nev. 1978). Even timely filed petitions will not be considered unless the defendant waives the Nevada statutory requirement that

trial commence within 60 days. Both Nevada and Georgia have statutes which limit the time within which an appeal from the trial court's ruling on a habeas petition may be brought. *See Jordan v. Housewright*, 696 P.2d 998, 999 (Nev. 1985); *Patterson v. Earp*, 257 Ga. 729 (1988).

The statute of limitations found in O.C.G.A. § 40-13-33 finds its closest counterpart in federal law in Rule 9(a) of the Rules Governing Section 2254 Cases. Rule 9(a) establishes the defense of laches in federal habeas corpus proceedings. If filing of the petition has been delayed so as to prejudice the respondent's ability to respond to the petition, the petition will be dismissed unless the petitioner can demonstrate that, through the exercise of reasonable diligence, the petition could not have been brought earlier. *See, e.g., Lawrence v. Jones*, 837 F.2d 1572 (11th Cir. 1988). The Georgia statute, of course, has an additional feature not provided by Rule 9(a); the statute provides a clear and definite period of time within which the petition is, as a matter of law, timely. Thus, both the petitioner and the respondent can by simple mathematical calculation determine whether the petition is timely filed, without expending time and resources of the parties and the court on a petition later dismissed as tardily filed, and without expending these resources in a case by case determination of whether the equities favor consideration of the merits of a petition. Of course, the definite time period established by the statute also promotes greater uniformity of result.

All statutes of limitation have as their goal the promotion of justice by preventing erroneous determinations through the presentation of claims that have been

allowed to slumber until evidence has been lost, memories have faded, and witnesses are no longer available. *See Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49 (1944). The basic theory behind all statutes of limitation is that, even where one has a just claim, that claim should be brought in a timely manner in order that the finder of fact may make accurate determinations; over time, the State's interest in accurate determinations comes to outweigh the litigant's right to assert the stale claim.

Just as the equitable defense of laches embodied in Rule 9(a) is not an improper suspension of the writ of habeas corpus, Georgia's statutory period of limitation is also not an improper suspension of the writ. While invalid convictions should be set aside, the State has a compelling interest in not having valid convictions set aside simply because memories have faded and manufactured claims can no longer be refuted due to the passage of time.

Petitioner's statements to the contrary notwithstanding, the State of Georgia in no way prevented Petitioner from filing his petition in a timely manner. Contrary to Petitioner's claim, Georgia does not require a petitioner whose driver's license has been suspended or revoked to "first exhaust available administrative remedies. . . . " Rather, Georgia has established a two-track system of review. Alleged administrative errors by the Department of Public Safety in revoking or suspending the license are subject to an administrative review, from which the driver is afforded the opportunity to seek judicial review. As the purpose of this review is to eliminate administrative errors by the Department, the only ground upon

which a conviction used by the Department as a basis for the suspension or revocation of a license may be challenged is if the conviction is void on its face. *See, e.g., Earp v. Fletcher,* 183 Ga. App. 593, 594 (1987). If the driver agrees that the Department of Public Safety has not made administrative errors, but contends that the *courts* erred in the proceedings leading to his conviction and sentence, he may challenge those convictions by petition for writ of habeas corpus. *Hardison v. Martin,* 254 Ga. 719 (1985). *Earp v. Lynch,* 257 Ga. 633 (1987) is not to the contrary. *Lynch* (and its predecessor, *Earp v. Angel,* 257 Ga. 333 (1987)) does not establish a contrary rule of exhaustion; in those cases, the Supreme Court ruled simply that the driver sought review of alleged administrative errors by the Department of Public Safety which were cognizable only in the administrative review proceedings, not by petition for writ of habeas corpus. Thus, contrary to Petitioner's contentions, there is no "Catch 22" in the Georgia statute. If the driver wishes to challenge administrative errors of the Department of Public Safety, he may seek to rectify those alleged errors through the administrative review procedures; if he claims, as here, that the courts in which he was convicted committed error of constitutional dimension in the proceedings leading to the conviction and sentence, he may seek review of those convictions by petition for writ of habeas corpus.

CONCLUSION

Respondent properly revoked Petitioner's driver's license based upon his three convictions for driving under the influence of alcohol or drugs within a five-year period. Notwithstanding O.C.G.A. § 40-13-33, which requires that a driver seeking review by petition for writ of habeas corpus of misdemeanor traffic convictions file the petition within 180 days of conviction, Petitioner did not file his petition until some two years after the last of his three convictions. The record clearly demonstrates that Petitioner had completed service of the sentences for the convictions challenged in the case at bar prior to the filing of the petition, and thus could not have maintained a petition for writ of habeas corpus in the federal courts at any time during the pendency of this matter. Petitioner contends that the United States Constitution requires the State of Georgia to provide, in state post-conviction proceedings, a remedy where no federal remedy is afforded. This argument is absurd. If the constitutional prohibition against the suspension of the writ does not require the federal courts to entertain Petitioner's Petition for Writ of Habeas Corpus, it clearly does not require the State of Georgia to do so. Moreover, it is urged by Respondent that, while the United States Constitution prohibits the suspension of the writ of habeas corpus in the federal courts, it has no application to whether the state chooses to afford any post-conviction remedies in its own courts, and emphatically does not require the State to entertain stale claims brought by individuals who have sat upon their rights rather than asserting them in a timely manner. Accordingly, Respondent respectfully requests that

this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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